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IN THE

Supreme Court of the United States

October Term, 1968

No. 462

MORRIS SMITH, RANDOLPH PHILLIPS, and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of Alleghany Corporation,

Petitioners,

against

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and ROBERT J. FITZSIMMONS, and ALLEGHANY CORPORATION,

Respondents.

ANSWERING BRIEF OF RESPONDENT ROBERT J. FITZSIMMONS

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212 WO 4-5770

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ANSWERING BRIEF OF RESPONDENT ROBERT J. FITZSIMMONS

Preliminary

The petitioners have "consolidated" in this Court two actions and a proceeding, only one of which involves the respondent Fitzsimmons. The only action or proceeding to which Fitzsimmons is a party is the one entitled *Morris Smith and David Wiener,* Plaintiffs against *Robert J. Fitzsimmons, Allan P. Kirby, Jr. and Fred M. Kirby II as Guardians of the Property of Allan P. Kirby and Alleghany Corporation, Defendants,* (66 Civ. 1938) (hereinafter

"Smith action"). The Smith action was commenced in the United States District Court for the Southern District of New York in 1966.

The device of "consolidation" is utilized by petitioners in an improper attempt (See, *Lawn* v. *United States*, 355 U.S. 339, 354 (1958)) to bring before this Court matters not contained in the record of the *Smith* action. Thus none of the matter set forth in the petition (pp. 21-24, pars. (x) through (xiv), is in the record of the *Smith* action. Such matter was supplied by petitioners for the first time to the Court of Appeals in a so-called Rule 19(c) application, which was never served by petitioners upon Fitzsimmons and to which he is not a party.

Questions Presented

1. Whether stockholders in a derivative stockholder's action brought in the United States District Court may relitigate questions which have been once litigated in the Courts of a State in a different derivative stockholder's action?

2. Is a Referee appointed by the Supreme Court of the State of New York who is thereafter appointed Special Master in the United States District Court answerable for his conduct as such Referee and as such Special Master in a subsequently commenced private litigation brought in the United States District Court?

Statement of the Case

The complaint in the *Smith* action sets forth four alleged claims; only the first, third and fourth claims are asserted against Fitzsimmons (3a-33a).*

* Figures (-a) refer to pages in petitioners' appendix in the Court below; figures (-b) refer to pages in Fitzsimmons' appendix in the Court below; figures (K-) refer to pages in Kirbys' appendix to the Court below.

The first, third and fourth claims appear to be that orders and judgments of the Supreme Court of the State of New York, County of New York, made in 1959 and 1960, in a stockholder's suit brought on behalf of respondent Alleghany Corporation, entitled *Zenn* v. *Anzalone* ("Zenn action"), which approved a settlement of the Zenn action and awarded fees to Fitzsimmons for his services as Referee in the Zenn action and as Special Master in a related stockholder suit pending in the United States District Court for the Southern District of New York, entitled *Breswick Co.* v. *Briggs* ("Breswick action"), should be set aside in this wholly collateral Smith action.

The pleaded grounds for the collateral attack on the State Court orders and judgments are

1. In 1960 the New York Supreme Court fixed Fitzsimmons' compensation both as Referee and Special Master (5a-6a). In fact all parties knew that the Supreme Court would so fix Fitzsimmons' compensation, all parties had an opportunity to litigate this issue, and United States District Judge Dimock authorized such procedure (13b, 12b-13b, 14b, K 139a, 15b, 16b).

2. Fitzsimmons and Alleghany's attorney secretly negotiated this compensation even though such attorney had a conflict in his duties to Alleghany and to Kirby (7a, 8a). The allegation of secrecy is then recanted and it is alleged that Fitzsimmons reported the "secret" negotiations to the Supreme Court (cplt. par. 23, 8a). There is not a word of evidence to support the allegations of "secret" negotiations and conflict of interest, and all of the evidence refutes such allegations (16b, 50a).

3. Fitzsimmons did not write his report recommending approval of the settlement of the *Zenn* action in the New York Supreme Court, and that it was

written by Kirby's lawyer (16a). Again there is not a word of evidence to support this allegation. All of the evidence refutes such allegation (21b).

4. Fitzsimmons generally acted improperly in conducting hearings as State Court Referee and in making his findings and conclusions as such Referee (11a, 18a, 19a, 20a, 22a, 23a, 24a, 25a, 27a, 29a). There is no evidence to support such allegations. All of the evidence refutes such allegations (3b-7b, 8b-24b). In any event as matter of law, Fitzsimmons cannot be called to account in a private lawsuit for his judicial conduct as Referee and Special Master.

The relief demanded against Fitzsimmons is that he repay the $125,000 which the State Court allowed him for his fees as Referee and Special Master (30a-31a).

The facts in more detail

By order of the Supreme Court, New York County, dated August 18, 1955, Fitzsimmons was appointed Referee to inquire into the fairness of a proposed settlement of the Zenn action (10b). While Fitzsimmons was holding hearings in the Zenn action, the United States District Court for the Southern District of New York, by order dated October 3, 1956, appointed him Special Master to hear and report as to whether an injunction issued in the Breswick action should be vacated (10b). The injunction barred the defendants in the Breswick action from pleading as a defense any judgment resulting in the State Court from the settlement of the Zenn action (10b).

About November 17, 1958 Fitzsimmons filed his report with the State Court recommending approval of the proposed settlement of the Zenn action (10b-11b); at the same time Fitzsimmons filed his report with the District Court recommending that the injunction be vacated in the Breswick action (11b). These reports were written solely by Fitzsimmons, with the aid of his partner Mooney, and no other attorney or person was involved therein (21b).

Mr. Justice McGivern of the State Court confirmed Fitzsimmons' report in the Zenn action in an opinion filed on March 11, 1959, but directed that until the injunction in the Breswick action was vacated, no judgment approving the settlement could be entered in the Zenn action (11b).

Judge Dimock of the District Court ruled that the record in the Breswick action should be at least co-extensive with the record made before Fitzsimmons in the Zenn action (11b), and remitted the matter to Fitzsimmons for further hearings (11b). Fitzsimmons had scheduled new hearings pursuant to Judge Dimock's ruling when the parties in the Breswick action commenced settlement proceedings and reached an over-all settlement of all actions (12b).

Proceedings were held before Judge Dimock on a new application to vacate the injunction (12b). During the hearings the attorney for an objectant in the Zenn action, who spoke on behalf of the plaintiffs in the Breswick action, advised Judge Dimock that all applications for fees would be made in the Zenn action (12b-13b).

Judge Dimock on December 24, 1959 approved the said over-all settlement and vacated the injunction (13b, 24b). Mr. Justice McGivern then made orders, entered on December 28 and 29, 1959, dismissing the complaint in the Zenn action upon compliance by defendants with the terms of the over-all settlement (13b).

Mr. Justice McGivern's order, which, as is customary, was prepared and approved by counsel for all parties, expressly provided that Fitzsimmons could apply to the State Court for his fees both as Referee in the State Court and as Special Master in the District Court (13b).

Fitzsimmons reports had been filed more than one year (11b) prior to the entry of the orders in the Zenn action and in the Breswick action approving the settlement (13b, 24a). Once those reports were filed there was nothing

Fitzsimmons could do to affect the settlements. The only thing left for him to do was to apply for his fees.

Before Fitzsimmons applied for his fees, he called upon Judge Dimock to bring Judge Dimock up to date on developments (13b, 14b). Fitzsimmons told Judge Dimock that under Justice McGivern's order he was authorized to apply to the State Court for his fees both as Referee in the Zenn action and as Special Master in the Breswick action (13b, 14b, K 139A), and that he would do so unless Judge Dimock desired that he do otherwise (13b, 14b, K 139A). Judge Dimock told Fitzsimmons that he had no objection and that Judge Dimock would not require Fitzsimmons to apply to the District Court for his fees as Special Master (14b, K 139A).

Fitzsimmons thereupon applied to the State Court in May 1960 for his fees both as Referee and as Special Master in the amount of $150,000 (14b, 16b). The application was made on notice to all counsel or persons who had appeared at any time in either of the actions—33 attorneys and law firms (15b).

Thus opportunity was given to all who had evidenced any interest in the proceedings to litigate any aspect of Fitzsimmons' fees. No one opposed his application except the attorney for Alleghany who argued that $150,000 was excessive, but made no recommendation as to what he considered proper (16b).

Fitzsimmons then met with Alleghany's counsel and suggested that he file an affidavit setting forth his views as to the proper amount so that Fitzsimmons could reply thereto and thus pose the issue of amount of his fees fairly in the record (16b). Alleghany's counsel said he would consider the matter and discuss it with his associate counsel (16b); Fitzsimmons did not ask Alleghany's counsel to concur on an amount (50a) and such counsel did not indicate that he would concur on an amount (50a).

There was no further contact between Fitzsimmons and Alleghany's counsel (16b). Mr. Justice McGivern apparently did contact Alleghany's counsel and subsequently fixed Fitzsimmons' fees at $125,000 (16b).

The proceedings herein

In 1966, the petitioners commenced this action in the District Court. Fitzsimmons and the other respondents herein moved under Rule 12, Fed. R. Civ. R. to dismiss the complaint for failure to state a claim for relief and under Rule 56, Fed. R. Civ. P., for summary judgment. The plaintiffs also moved for summary judgment on the first claim. On the record made before him the District Judge (Bonsal, *J.*) granted respondents' motions to dismiss the complaint and for summary judgment (68a-77a; 264 F. Supp. 268), and the Court of Appeals unanimously affirmed, 394 F. 2d 381 (2 Cir. 1968).

Inasmuch as petitioners commenced this action in the District Court, we are at a complete loss to understand their contention that the District Court could not administer this case, and that only the Court of Appeals sitting *en banc* had original jurisdiction thereover (Pet. pp. 11, 28-33). If the District Court did not have original jurisdiction over the Smith action, then petitioners should not have filed their complaint in the District Court and should have filed it in the Court of Appeals. We know of no authority in the Rules for such procedure, but certainly if the District Court did not have original jurisdiction then no appeals Court could have appellate jurisdiction.

By the same token, if petitioners had any evidence to meet Fitzsimmons' motion for summary judgment, it was their duty to adduce the same in the District Court (Rule 56; Fed. R. Civ. P.). It is too late after a trial in, or after summary judgment has been granted by, the District Court to claim that evidence was withheld by petitioners from the District Court so that it could be presented to the Court of Appeals. All appellate Courts are bound by the record made in the District Court. *Lawn* v. *United States*, 355 U.S. 339, 354 (1958).

Summary of Reasons Why Certiorari Should Be Denied

The Courts below decided the Smith action on the bases of well settled rules of law properly applied to undisputed facts. There is no conflict in the decision below with any decision of this Court or of any Court of Appeals; to the extent that the decision below involves either State or Federal questions, the law is well settled and was decided below in conformity with the decisions of this Court, of other Courts of Appeals, and of the New York State Courts. There is no departure here from accepted and usual course of judicial proceedings.

The Court below said (p. 391 of 394 F. 2d):

> "Since the matter of Fitzsimmons' fee was submitted to the state court, and the parties in *Zenn* were free to object to the amount and to raise any issues pertaining to the fee award, the matter is now closed under the principle of the res judicata".

The Court below further noted that collateral attacks on the subject matter jurisdiction of the State Court were also foreclosed. This was in response to petitioners' contention that because of Rule 53(a) Fed. R. Civ. P., only the District Court could fix the fees of a Special Master. The Court below said (p. 391 of 394 F. 2d):

> "With few exceptions a collateral attack upon the subject matter jurisdiction of a court in which both parties have appeared is prohibited notwithstanding the failure of the parties to litigate the issue. *United States* v. *Eastport Steamship Corporation*, 255 F. 2d 795, 803 (2 Cir. 1958)"

ARGUMENT

I.

The claims against Fitzsimmons are barred by estoppel.

The attacks which petitioners now level in their complaint against Fitzsimmons' fees could have been raised in the State Court, and any error of the State Court (jurisdictional or otherwise) could have been reviewed on appeal from the State Court judgment. *Sheriff* v. *Heyman*, 23 App. Div. 2d 555 (1st Dept. 1965) affd. 16 N.Y. 2d 944 (1965); *Cross Properties, Inc.* v. *Gimbel, Bros. Inc.*, 15 App. Div. 2d 908 (1st Dept. 1962).

Accordingly, since any error could have been corrected on appeal, no independent, collateral action, such as the one at bar can be maintained. *Ackermann* v. *U.S.*, 340 U.S. 193 (1950); *Simmons* v. *Saul*, 138 U.S. 439, 458-60 (1891); *Graham* v. *Boston H. & E. R.R.*, 118 U.S. 161, 177-8 (1886).

Judge Dimock authorized the application by Fitzsimmons to the State Court for fees both as Referee and as Special Master. If the State Court failed to apply or erroneously applied Rule 53(a) Fed. R. Civ. P., such error is immaterial. *Gart* v. *Cole*, 263 F. 2d 244 (2 Cir. 1959) cert. den. 359 U.S. 978 (1959). Even if Rule 53(a) vests exclusive jurisdiction in the District Court to fix the fees of Special Master, any error of the State Court in assuming jurisdiction could have been corrected by appeal ultimately to this Court. *Leiman* v. *Guttman*, 366 U.S. 1 (1949); *Brown* v. *Gerdes*, 321 U.S. 178 (1944). No independent collateral action, such as the one at bar, will lie. *Ackermann* v. *U.S.*, 340 U.S. 193 (1950). The estoppel of the State Court judgment is fully effective. *Angel v. Bullington*, 330 U.S. 183, 189 (1947); *Tomiyasu* v. *Golden*, 358 F. 2d 651, 653 (9 Cir. 1966).

It was open for any party in the State Court to litigate the question of who should pay Fitzsimmons' fees, whether or not they could be based in any part on services rendered as Special Master, and the amount thereof. The State Court judgment is thus res judicata of every issue sought to be raised here. *Grubb* v. *Public Utilities Commission*, 281 U.S. 470, 479 (1930); *Statter* v. *Statter*, 2 N.Y. 2d 688 (1957).

It is legally immaterial whether the findings and judgment of the State Court resulted from stubborn contention or by way of concession. *Statter* v. *Statter*, 2 N.Y. 2d 688, 673 (1957). Any claim of newly discovered evidence is likewise legally immaterial and will not lift the bar of estoppel. *Statter* v. *Statter*, 2 N.Y. 2d 668, 674 (1957).

The rules laid down in the *Statter* case are well settled. See, *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 321-2 (1927); *Wolcott* v. *Hutchins*, 245 F. Supp. 578, 580 (S.D.N.Y. 1965); *Phillips* v. *Bradford*, 288 F. Supp. 397, 401-2 (S.D.N.Y. 1964); *Crouse* v. *McVickar*, 207 N.Y. 213, 217-19 (1912); *Hinchley* v. *Sellers*, 7 N.Y. 2d 287, 293 (1959).

Petitioners, claimed stockholders of Alleghany, are of course bound by the judgments in the Zenn action, a true class action. *Stella* v. *Kaiser*, 218 F. 2d 64, 65 (2 Cir. 1954) cert. den. 350 U.S. 835 (1955); *Gart* v. *Cole*, 263 F. 2d 244, 247-8 (2 Cir. 1959) cert. den. 359 U.S. 978 (1949) and cases cited at pp. 247-8 of 263 F. 2d; *Gary* v. *Gary*, 6 Misc. 2d 669 (Sup. Nassau 1957); cf. *Rehill* v. *Rehill*, 306 N.Y. 126 (1953). *Hansberry* v. *Lee*, 311 U.S. 32 (1940) a spurious class suit is utterly inapplicable.

II.

The allegations that Fitzsimmons had a disqualifying interest in the actions are legally insufficient.

Petitioners make vague and conclusory allegations in their complaint that Fitzsimmons was disqualified to act as a Referee, presumably under Section 14 of the Judiciary Law of New York.

Section 14 disqualifies a Referee or a Judge if he has an interest in the action he is deciding. The law is settled that a Referee or Judge has no such interest unless his interest is

> "of such nature as would involve direct pecuniary gain or loss." *Matter of Hancock*, 91 N.Y. 284, 292-3 (1883).

The interest

> "must be real; it must be certain and not merely possible or contingent; it must be one which is visible, demonstrable and capable of precise proof." *People* v. *Whitridge*, No. 2, 144 App. Div. 493, 498 (1st Dept. 1911).

Fitzsimmons concededly filed his reports in November 1958, and orders and judgments approving the same were entered in December 1959. The complaints were dismissed in December 1959, subject to compliance with the terms of the settlement. These terms were complied with by May 13, 1960, and Alleghany then delivered general releases to the defendants in the stockholder suits (218 F. Supp. 179). On June 21, 1960, final judgment was entered dismissing the *Zeus* action on the merits.

If, contrary to fact, Fitzsimmons negotiated for his fee in June 1960, it is obvious that such negotiation conferred no interest in Fitzsimmons. Such dealings could not possibly have influenced his previous actions almost two years earlier and there is neither corruption nor disqualification. *Moers* v. *Gilbert* 175 Misc. 733 (Sup. N.Y. 1941), affd. 261 App. Div. 957 (1st Dept. 1941).

Universal Oil Products v. *Hall*, 76 F. 2d 258 (8 Cir. 1935), is not in conflict with the decision of the Court below. In the *Hall case*, a Special Master was appointed with power and directions to hear testimony and make and report findings of fact and conclusions of law to the Court. Before the proceedings commenced, the Special Master induced the

parties to stipulate that he should receive a fee of $100 per day plus expenses and disbursements and "any additional sum that may be allowed by the Court" (p. 259 of 76 F. 2d).

The Court of Appeals in *Hall* ruled that the Special Master had "exacted" the stipulation for his fees from the parties. Nonetheless, although the Court removed the Special Master for the purpose of making the findings of fact and conclusions of law, the Special Master was allowed to retain his fees for the 550 days claimed to have been devoted to the taking of testimony at the stipulated rate of $100 per day (pp. 262, 264 of 76 F. 2d).

III.

Judicial immunity bars the claims against Fitzsimmons.

With the exception of the allegations concerning Fitzsimmons' application for fees, all of the allegations relating to Fitzsimmons concerned his alleged conduct while acting as Referee and Special Master.

A Referee or Special Master is a judicial officer. *Schwimmer* v. *U.S.*, 232 F. 2d 858 (8 Cir. 1956) cert. den. 352 U.S. 833 (1956); *McCormick* v. *Walker*, 158 App. Div. 54 (1st Dept. 1913).

The law is settled beyond all doubt that Fitzsimmons may not be called to account in any private action for his alleged conduct as Referee or Special Master. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Bradley* v. *Fisher*, 13 Wall. (80 U.S.) 335 (1872); *Lange* v. *Benedict*, 73 N.Y. 12, (1878).

Petitioner's contention based upon the civil rights Act (42 U.S.C. Secs. 1983, 1985) is unavailing to overturn the judicial immunity of Fitzsimmons. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Morgan* v. *Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1954) affd. 220 F. 2d 758 (2 Cir. 1955) cert. den. 350 U.S. 867 (1955).

IV.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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